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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1179

GEORGE RAMSEY, LEON NUNLEY, d/b/a LEON NUNLEY COAL COMPANY; PAUL GIBBS, d/b/a PAUL GIBBS COAL COMPANY; LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis and J. H. GRAHAM, d/b/a NINTH WEST COAL COMPANY; A & R COAL COMPANY, INC.; W. T. MORRISON and J. H. GRAHAM, d/b/a M & G COAL COMPANY; J. H. GRAHAM COAL COMPANY, INC.; W. T. MORRISON and LOIS HALL TRAVIS, Administratrix of the Estate of W. J. Travis, d/b/a M & T COAL COMPANY; STEPHENSON BROTHERS COAL COMPANY, INC.; EDWARD NUNLEY d/b/a EDWARD NUNLEY COAL COMPANY; EAST VALLEY COAL COMPANY, INC.; ELLIS WARD and LON L. VARNELL, d/b/a TRACY CITY COAL COMPANY; HENRY WILLIS FLYNN, d/b/a WILLIS FLYNN COAL COMPANY; H. W. FLYNN COAL COMPANY, INC.; HOWARD HIGGINS, d/b/a HOWARD HIGGINS COAL COMPANY; HOWARD HIGGINS COAL COMPANY, INC.; MARSHALL MEEKS; TENNESSEE PRODUCTS AND CHEMICAL CORPORATION,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA,

Respondent.

On Writ of Certiorari to the United State Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO THE BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

Petitioners have replied to some of the contentions made by UMW in the reply of petitioners to the brief of Bituminous Coal Operators Association (BCOA), Amicus Curiae.

But now UMW attempts to switch from its previous contentions (adopted by the lower courts) that the "clear proof" rule governs all questions and conclusions as to antitrust violation. It contends now that the trial court really did apply the preponderance of evidence rule and agrees now that this was the proper rule.

Also UMW contends now that there was no restraint at all put upon UMW in bargaining with other units by Paragraph A of the Protective Wage Clause (PWC) which paragraph was demanded by BCOA and other major associations. UMW contends now that all Paragraph A really says is that UMW will enforce the contract in all units and there was no restraint at all as to the kind of "agreements and understanding" UMW could later have even as to signatories.

These revamped contentions, while they show UMW's lack of confidence in previous arguments, come after the lower courts adopted those previous arguments and dismissed petitioners' case because of those arguments. The revised contentions will not fit the record below.

ARGUMENT

I. SEVERAL UMW CONTENTIONS HAVE ALREADY BEEN ANSWERED IN THE REPLY OF THE PETITIONERS TO THE BRIEF OF BITUMINOUS COAL OPERATORS ASSOCIATION, AMICUS CURIAE, PREVIOUSLY FILED.

Petitioners make reference to their reply to the brief of BCOA as amicus curiae, which reply answers a number of the points made by UMW's brief. It would be redundant to repeat those statements here, but we do call the Court's attention to our reply to the BCOA Brief.

II. UMW ATTEMPTS TO SWITCH FROM ITS PREVIOUS CONTENTION WHICH WAS APPLIED BY THE LOWER COURTS THAT THE CLEAR PROOF RULE GOVERNS ALL QUESTIONS AND CONCLUSIONS AS TO ANTI-TRUST VIOLATION.

The UMW brief says at page 20 that it does not now contend that Norris-LaGuardia's Section 6 "clear proof" rule requires that "all elements of a cause of action for anti-trust violation must be made out by 'clear proof' when a labor union is a defendant ...", as the Court of Appeals had interpreted UMW's previous argument and the holding of the trial court. UMW now says that the trial court applied the preponderance rule after all, and that this was correct. This is a radical departure from previous briefs and arguments made in lower courts by UMW.

The decision of the trial court (by Judge Wilson in the Southern Division of the Eastern District of Tennessee) in this case came after the decision of the trial court (by Judge Taylor in the Northern Division of the Eastern District of Tennessee) in *Lewis v. Pennington*, 257 F. Supp. 815 ("*Second Pennington*").

The over-stretching of the clear proof rule began with proposed conclusions of law submitted to the court in *Second Pennington* by UMW, including the following:

> "The standard of proof that governs these cases with respect to the alleged Sherman Act cause of action ***and all of the issues of fact therein***, is that of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106. (Emphasis supplied).
>
> "In a civil action subject to the requirements of Section 6 of the Norris-LaGuardia Act the proponent may not prevail by meeting the ordinary civil burden of persuasion. He must prevail by a substantial margin of proof, for Section 6 at least requires clear, unequivocal and convincing evidence. A bare preponderance of the evidence is insufficient (citing *UMW v. Gibbs*, 383 U.S. 715)."

The trial court in *Second Pennington* adopted the foregoing and other views of law proposed by UMW. The trial court said in *Second Pennington*:

> "Upon careful consideration, the court has reached the conclusion that the Pennington case teaches that it is necessary to find predatory intent to drive small coal operators out of business in order to hold employer and union for a violation of the Sherman Act ...."
>
> "The standard of proof necessary to show predatory intent is governed by the recent decision of the Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715." *Lewis v. Pennington*, 257 F. Supp. 815 at 829.

The Court of Appeals in *Second Pennington* sustained the foregoing view, saying:

"We thus understand Pennington to teach that:

"(1) A conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act;

"(2) 'Predatory intent' (as used by Mr. Justice White [381 U.S. at 668] and by Judge Taylor) is merely shorthand, employed to describe this anti-competitive conspiracy; and

"(3) Such an anti-competitive conspiracy must be established by 'clear proof'. See also *United Mine Workers of America v. Gibbs*, 383 U.S. 715." *Lewis v. Pennington*, 400 F.2d 806 at 814.

In the case at bar Judge Wilson followed the foregoing views of Judge Taylor on the clear proof rule. Here are some of the places in Judge Wilson's Opinion in this case which show his adoption of this stringent interpretation:

"One further subject needs to be given attention here and that is the standard of proof that must govern a proceeding involving a Sherman Act charge against a labor union. The burden of proof borne by the plaintiff is not the usual preponderance of the evidence rule applicable in civil cases generally. The requirement imposed by Section 6 of the Norris-LaGuardia Act is that of 'clear proof' where a labor organization is a party to an action such as this. ..."

"That the 'clear proof' standard applies to an action wherein a labor organization is sought to be charged with a Sherman Act violation appears settled. *United Brotherhood of Carpenters v. United States*, 330 U.S. 395. See also *Lewis v. Pennington*, 257 F. Supp. 815." (80a; 265 F. Supp. 388 at 400)

* * *

"Having concluded that the Protective Wage Clause does not constitute an express commitment upon the part of the UMW to the BCOA not to bargain with any other coal operator upon any terms other than the national contract, this does not conclude the issue of whether the UMW did in fact, though not expressly, so contract with the BCOA. Were this case being tried upon the usual preponderance of the evidence rule applicable to civil cases, the court would conclude that the UMW did so impliedly agree. However, the standard of proof where a labor union is involved is 'clear proof', as required by Section 6 of the Norris-LaGuardia Act, a standard different from the ordinary civil burden of persuasion. ***United Brotherhood of Carpenters v. United States***, 330 U. S. 395; ***United Mine Workers v. Gibbs***, 383 U.S. 715. The court is of the opinion that the evidence upon the record in this case does not establish such clear and unequivocal proof as to warrant the court in finding that the UMW pursued its policy of uniformity of wage and labor standards by agreement with one or more employers as distinguished from pursuing such policy upon its own." (108a; 265 F. Supp. 388 at 412)

* * *

"Clear proof does not appear either directly or by inference that the UMW acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field in the period hereunder review." (147a; 265 F. Supp. 388 at 430)

* * *

"The central relevant inquiry at this point is whether all of the evidence, when viewed as a whole, clearly

manifest a union-businessmen combination to achieve a predatory anti-competitive end. Otherwise the union activity here complained of would come within the congressionally established labor organization exemption to the anti-trust laws." (149a; 265 F. Supp. 388 at 431)

* * *

"The court likewise cannot overlook the fact that the standard of proof imposed upon the plaintiff is that of 'clear proof' rather than a mere preponderance of the evidence. *United Mine Workers v. Gibbs*, 383 U.S. 715." (151a; 265 F. Supp. 388 at 432)

* * *

"Reviewing the evidence as a whole in this light, the court is unable to find that the evidence clearly reflects that the plaintiffs were the victims of any conspiracy between the UMW and any coal operators or other non-labor organization to eliminate or suppress competition in the coal industry or to eliminate or suppress the production and sale of coal by the plaintiffs." (151a; 265 F. Supp. 388 at 432)

* * *

"Did not the clear evidence rule apply, the court might have reached a different conclusion upon certain issues. Likewise, did the prima facie rule, as announced by Justice Douglas in the Pennington case apply, a different view of the evidence would have been required." (157a; 265 F. Supp. 388 at 434-5)

In its brief in the Court of Appeals in this case UMW's position was this:

"Companies simply refuse to give effect to labors exemption and to the principle, that, antecedent to the issue of unreasonable restraints, it is their burden first to prove the union has forfeited its exemption and this includes predatory motivation, and that this must be done by clear proof, i.e., proof that satisfies Norris-LaGuardia's Section 6 as mandated by *Gibbs*, (383 U.S. 715)." (UMW Brief in Court of Appeals, page 95)

After the oral argument in the Court of Appeals in this case the majority of the three judge panel held that UMW was wrong on this proposition and the Court of Appeals in *Second Pennington* was wrong also. Then UMW filed a petition to rehear in banc, saying:

"The majority opinion erred in holding the preponderance of evidence rule the proper standard of proof herein and in rejecting the 'clear proof' rule. It conflicts with the standard enunciated in *Lewis v. Pennington*, 400 F.2d 806 in contrast with the Supreme Court's denial of certiorari therein."

This contention by UMW got the Court of Appeals to rehear in banc. The Court then split four to four and reinstated the trial court's judgment in favor of UMW. The judges favoring UMW relied on the above quoted language from *Second Pennington*.

In its brief in opposition to the petition for certiorari in this case in this Court, UMW rephrased petitioners' first question and in so doing recognized that the pertinent point was:

"Did the Sixth Circuit's affirming opinion and the District Court properly hold that proof of the conspiracy between employers and labor, formed with the in-

tention of driving competitors out of business, is essential to a finding that a labor union has violated the Sherman Anti-trust Act and that the anti-competitive conspiracy must be established by 'clear proof' under Section 6 of the Norris-LaGuardia Act?" (Brief of Respondent UMW in Opposition, page 3)

UMW also said in its brief in opposition to the petition in this case:

"The issue over which the court divided was whether Norris-LaGuardia's Section 6 required all elements of a cause of action for antitrust violation to be proved by 'clear proof' where a labor union is defendant, as held in the Edward's Opinion, or whether the statute's standard is limited 'to the determination of the authority of individual officers, members or agents to act for a labor union or other organization' as the O'Sullivan Opinion contended." (Brief of Respondent UMW in Opposition, pages 16-17)

Now UMW says in its brief, page 20, that it no longer contends that the "clear proof" rule applies to all elements of the proof of violation or to the ultimate conclusion as to violation. It says now, rather, that the preponderance of evidence rule applies and, that after all the fireworks in the trial court and in the Court of Appeals over this question, the trial court really was applying only the preponderance rule all the time.

It is clear from the above quoted language from the trial court opinion that this new rationale by UMW will not work. That opinion followed the views in *Second Pennington* on clear proof and expressly and distinctly applied clear proof to cover all issues and the reaching of ultimate conclusions as to violations of antitrust law.

UMW strains mightily to make the trial court's language mean something directly opposite from what the language clearly says. A long discussion is given in the UMW brief of the same judge's charge to the jury in a later trial against UMW on the same theory by Tennessee Consolidated Coal Company. But that case came after extensive argument on this question of standard of proof in this kind of case, and after reference to the contentions of text writers who challenged the clear proof application in *Second Pennington* and *Ramsey*. Enough argument was generated after the shock of *Second Pennington* and *Ramsey* not only to change the views of Judge Wilson in the later jury trial of Tennessee Consolidated Coal Company's case, but also to cause the Court of Appeals to split four to four on this issue. Also the Court of Appeals sustained the restricted application of clear proof in the Tennessee Consolidated Coal Company case. (416 F.2d 1192)

But all of this later history does not change the plain language of the trial court's opinion in the case at bar, or the obvious split in the Court of Appeals, as to the application of clear proof. The effort of UMW now to switch the obvious import of that language is a final admission that its arguments below had the lower courts off the right track.

In the latter part of its opinion in this case the trial court turned from the question of whether the UMW agreements or contracts violated antitrust policy and considered whether the proof showed a predatory conspiracy. In this part of the opinion the Court dismembered, compartmentalized and weighed some of the proof. Some of the most vital evidence and contentions of petitioners were never mentioned, put on the scales and weighed in this process. UMW now in its brief points to this part of the opinion

which compared the contentions of both sides as to isolated parts of the case, and UMW uses these as an indication that the trial court was using the preponderance rule rather than clear proof as the standard of proof.

But the dismembering and compartmentalizing process is not the way an antitrust case is properly decided. The whole picture must be weighed. All the proof and inferences on one side should be weighed at one time with all the proof and inferences on the other side. *Continental Ore Company v. Union Carbide Corporation*, 370 U.S. 690. But regardless of this rule, every time the trial court did reach a point where an ultimate conclusion was being made, the court turned to the clear proof rule and relied on it heavily as shown by the examples in the foregoing quotations from the trial court opinion.

No position like this was taken by UMW below. Certainly the two opinions of the Court of Appeals demonstrate that none of the judges on that court read the trial court opinion any other way than as applying the clear proof rule to all issues of liability all the way to the reaching of final conclusions. We submit that this is contrary to congressional intent as expressed in Section 6 of the Norris-LaGuardia Act and UMW apparently now recognizes the weakness of its previous arguments on this point.

III. PARAGRAPH A OF THE PROTECTIVE WAGE CLAUSE WAS SOMETHING MORE THAN SIMPLY AN AGREEMENT BY UMW TO ENFORCE ITS CONTRACTS AS UMW NOW CONTENDS.

As shown in petitioners' main brief UMW and BCOA set a pattern of negotiating a series of amendments to the national contract of 1950. Eighty-two per cent of the industry was brought under that national contract. Then

the Protective Wage Clause (PWC) was made part of the 1950 contract by the December, 1958 amendment. Paragraph A of PWC was inserted at the insistence of the coal associations with whom UMW dealt at that time. These facts are undisputed.

Paragraph A of PWC reads:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." (1105a-1106a)

The position of UMW in its brief filed in this Court appears to be that Paragraph A of PWC does nothing more than require UMW to enforce its contract uniformly against all signatories. It takes the position that there is no restraint upon UMW's bargaining freedom at all in the paragraph.

But Paragraph A uses language which shows without any doubt the intent to restrict UMW's bargaining freedom or ability to make any different kind of contract than the national contract. That is what the language plainly says. Also the last sentence required UMW to enforce the preceding language, which means seeing that all UMW "districts, local unions, officers or agents" observed those

provisions, since all of these were included in the definition of United Mine Workers of America in the introductory clause of PWC. True, the last clause of the last sentence of the paragraph binds the UMW to enforce the contract uniformly, as to all signatories, but all the rest of the paragraph is devoted to binding UMW and all its subdivisions and agents in a strait-jacket as to the kind of "agreement or understanding" they will have or "permit" in the future.

In the trial court petitioners contended that when BCOA and UMW negotiated and signed the first one of these PWC amendments, UMW was strait-jacketed in its bargaining policy. BCOA insisted on Paragraph A and it was obviously aimed at "agreements and understandings" in units other than BCOA because (looking at the situation as soon as UMW and BCOA signed the first copy) there was no point in having the language just for the BCOA unit alone "during the period of this [BCOA] contract." The BCOA unit was already under the contract as amended as soon as BCOA signed the first copy of the PWC amendment, and the question about what kind of contract would bind the BCOA unit was then settled, for the duration of the BCOA contract. From that point the language about UMW agreements and understandings in the future "during the period of this (BCOA) contract" could only apply to other units to make any sense, and that language would be binding on UMW as long at least as the BCOA contract was in effect.

But UMW argued below that the words "covered by this contract" modified the word "employees" rather than the whole expression "wages, hours or other conditions of work applicable to employees" in the first sentence of Paragraph A. From this argument UMW proceeded to argue that the restraint on future agreements applied only to employees covered by the contract, and from this, UMW

argued that only as to employers who had already signed the PWC amendment would the restraint on bargaining freedom of UMW be applicable.

The trial court in *Second Pennington* subscribed to this UMW interpretation. Then the trial court in the case at bar followed the *Second Pennington* lead, saying that it was lawful for UMW to assure "operators who were signatory to the agreement that it would not enter or permit any agreement governing labor standards 'applicable to employees covered by this contract' on any basis other than those specified by the contract." (106a-107a; 265 F. Supp. 388 at 412).

The Court of Appeals division supporting UMW followed the trial court saying that the restraint in Paragraph A could be construed to be "limited in its effect to its signatories," and "we agree with the District Judge that the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers."

The foregoing was in spite of the fact that petitioners were arguing that such a restraint, even confined to companies that had been brought under the national contract, would cause many companies to be wiped out by inability to bargain for practical and workable terms during the duration of the BCOA-UMW contract and this was a deprivation of bargaining freedom for most of the industry.

Petitioners raised this question in their petition in this Court under Question 2—is PWC valid under the Sherman Act even if the lower courts were right in confining its effects to signatories of the national contract during the duration of BCOA-UMW national agreement? We pointed out in our main Brief that companies were induced to sign national contracts by all sorts of means including violence

and various sorts of economic pressure. It is a rule of law that simply will not work to say that the major associations may legally demand that the UMW wipe out such companies without any freedom to modify terms which are ridiculous in their situations. The Southeastern Tennessee Coal Field gives an example of the open warfare that becomes inevitable under any such rule of law.

Now in its reply UMW says that Paragraph A of PWC is nothing more, in effect, than an agreement by UMW that it will enforce the contract as to all signatories and there is no restraint on bargaining freedom at all contained in the clause. It says now that not only were petitioners wrong in their original contention about the restraint being applicable to every unit whether signatory or non-signatory, but that the argument that it restrains at least the signatory companies is an argument "advanced by petitioners." (UMW brief, page 14). UMW claims this second point is a new and different "tack" by petitioners (UMW brief, page 17).

To the contrary, UMW was the party that induced the lower courts to hold that the clearly expressed restraints on bargaining freedom were applicable to "signatories". Having won on this point in the lower courts, UMW now seeks to pin this interpretation or theory on petitioners.

UMW now retreats to the argument that the whole of Paragraph A is encompassed in the last phrase of the last sentence having to do with enforcement of the contract as to all signatories. All the language putting restraints on the kind of "agreements and understandings" UMW will "enter into", "be a party to", or "permit" in the future adds nothing to the last phrase about enforcing the contract, according to the present arguments of UMW.

Why would BCOA and other major associations be the ones to insist on Paragraph A if it means that UMW was left free to make any contract it wanted to negotiate with any unit? This contention will not hold water as a bare reading of the PWC demonstrates, and the UMW present argument becomes all the more unlikely considering the parties who insisted upon the language in Paragraph A.

UMW's Brief goes on to argue that even if the Paragraph does bind UMW to apply terms uniformly, UMW has a legal right to have a uniform bargaining policy for all units and the contract does not express anything other than what UMW had a legal right to do. Of course the obvious answer to this is that perhaps UMW does have a right to engage in uniform bargaining with all units but it certainly has no right to bind itself at the insistence of the major associations to carry on such a policy. Clearly this is what UMW has done to the suppression of most of the coal industry.

Putting aside for the moment the fact that the major associations were insisting that UMW put language into the contract specifying what kind of contracts UMW could make in the future, and considering what kind of bargaining policy UMW could legally carry on unilaterally, we believe that the Employment Act (15 U.S.C. 1021 et seq.) contains congressional policy that should not be overlooked. UMW has in its brief some eight citations to *Apex Hosiery Company v. Leader*, 310 U.S. 469. But *Apex* was decided several years before the Employment Act became law. If, and so far as, *Apex* would allow a union to adopt a uniformity policy unilaterally that eliminates two-thirds to three-fourths of the industry jobs and creates mass unemployment while the union is suppressing competition in the industry, the case should be re-examined in the light of the policies (promotion of "free competitive enterprise"

and "maximum employment") expressed in the Employment Act particularly in 15 U.S.C. § 1021. Also there should be considered the policies expressed by the Joint Economic Committee of Congress which reports are authorized by the Employment Act and which are discussed in our main brief.

As to pursuit of "traditional union policies," contrast UMW conduct with the "traditional union policy" dealt with in *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261; and *Woodwork Manufacturer's Association v. NLRB*, 386 U.S. 612 at 640, the Court in the latter case using a quotation from a prior opinion by Mr. Justice Stewart:

> "In this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor."

Also health and safety of members have traditionally been of concern to unions. But contrast the conduct shown in this case. As early as 1956 delegations to UMW's international conventions were giving urgent warnings about the UMW-BCOA national contracts having the effect of forcing machines into the mines, not only to take away jobs, but also to create excessive dust, fumes and unhealthy conditions (See the record: 338a-345a; and see 563a-566a, 1035a-1036a). Now, even today the effect of the failure to heed these warnings is being felt in that it has become apparent from the history of the Federal Coal

Mine Health and Safety Act of 1969 and its application in the industry, that the big, high speed mining machinery (made practically necessary under the national contract) cannot be made to work within the presently established minimum health and safety standards. The social and economic disruptions from this situation do not come without warnings which should have long ago persuaded the UMW-BCOA unit to let up in the race for mechanization. Yet the only hope the trial court held out for Southeastern Tennessee at the end of its opinion (157a-158a) was "increased productivity"—i.e. put in the machines which destroy the jobs and the men. As the Secretary of the Interior said:

> "We pride ourselves on our resourcefulness and our efficiency. Yet, the way that we mine coal today is not humanitarian, resourceful, or efficient. It is inexcusably wasteful of our most precious asset—the human being." (U.S. Code Congressional and Administrative News, 91st Congress, First Session, 1969, Volume 2, Page 2507.)

But the principal answer to the present contention of UMW as to the right of the union to carry on the policy of uniformity with respect to all units, is the fact that it was the result of insistence by the major associations. The recognition by this Court of the legality under labor law of conducting bargaining through a multi-employer unit in *NLRB v. Truck Drivers Union*, 353 U.S. 87, could not mean the negation of expressed congressional policies contained in antitrust, labor and employment statutes as discussed in our main brief.

Indeed this Court pointed out in *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261 at 278, that the kind of multi-employer bargaining that comports

with labor policy is "free collective bargaining by representatives of the parties' own unfettered choice." This certainly would not include gathering in all of the industry units under a single contract by all sorts of means, and then allowing the dominant units to direct the union to keep all those other units corralled under completely impractical terms for the duration of the contract of the dominant units.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, petitioners request this Court to reverse and set aside the judgments of the Sixth Circuit herein complained of, as well as the District Court's judgments, and to remand the cases with directions that UMW be adjudged in violation of the Sherman Act and that a new trial be granted for the determination of damages suffered by petitioners under 15 USC, Section 15, or, in the alternative, that petitioners be granted a new trial.

Respectfully submitted,

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee 37902,

CLARENCE E. WALKER,
Pioneer Bank Building,
Chattanooga, Tennessee,

WILLIAM M. ABLES, JR.,
304 W. Third Street,
South Pittsburg, Tennessee,

SIZER CHAMBLISS,
610 Maclellan Building,
Chattanooga, Tennessee,

A. ALLAN KELLY,
South Pittsburg, Tennessee,

Attorneys for Petitioners.